IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1144

TEXAS INDUSTRIES, INC.,
Petitioner,

vs.

RADCLIFF MATERIALS, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF WEYERHAEUSER COMPANY AND WILLAMETTE INDUSTRIES, INC. AS AMICI CURIAE

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December 18, 1980

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INTEREST OF AMICI CURIAE

Weyerhaeuser Company and Willamette Industries, Inc. file this amicus brief to address important issues concerning the equitable apportionment of damages among defendants in antitrust cases which otherwise might not be discussed by the parties.[1]

Weyerhaeuser and Willamette are defendants in *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.), in which plaintiffs allege a nationwide conspiracy to fix

[1] Pursuant to Supreme Court Rule 36.2, the parties have consented in writing to the filing of this amicus brief. Letters expressing such consent are on file with the Clerk of the Supreme Court.

the prices of corrugated containers and corrugated sheets. In *Corrugated,* certain defendants sought to achieve proportionate liability through carve-out[2] and contribution.[3] *Corrugated* is a multi-defendant, class-action case in which several settlements have occurred. *Texas Industries* is a single-defendant, nonclass case involving no settlements. Despite these factual differences, the fundamental issue raised in both suits is proportionate liability in antitrust cases.

These amici curiae favor equitable apportionment of damages in antitrust cases, but believe it is important to recognize that such apportionment can be achieved through two different methods (contribution and carve-out) and that in each case the method appropriate to the particular factual circumstances should be used. In *Texas Industries,* petitioner, because of the particular facts of its case, is likely to focus solely on contribution as the method of achieving proportionate liability. It might not address the need for, or the proper way to achieve, proportionate liability in a multi-defendant, settlement case such as *Corrugated.* As demonstrated below, contribution is appropriate in the *Texas Industries*-type case, but should not be allowed against settling defendants, as in *Corrugated.* Rather, proportionate liability in the settlement context should be achieved through carve-out.

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[2] "Carve-out" is the reduction of the potential liability of nonsettling defendants by the proportionate share of liability attributable to defendants who have settled. Some refer to carve-out as "claim-reduction." The two terms are synonymous.

[3] This Court granted a writ of certiorari in *Corrugated* but subsequently dismissed the writ. *Westvaco Corp.* v. *Adams Extract Co., cert. granted,* 48 U.S.L.W. 3820 (June 16, 1980) (No. 79-972), *cert. dismissed,* 49 U.S.L.W. 3288 (Oct. 20, 1980), *petition for rehearing filed* (Nov. 14, 1980). Although Weyerhaeuser and Willamette settled the class-action portion of *Corrugated,* they remain defendants in the nonclass cases, which seek substantial recoveries and raise issues of proportionate liability.

Since contribution is only one facet of the underlying issue of proportionate liability in antitrust cases, the Court should not ignore the impact its decision here regarding contribution will have in multi-defendant, settlement cases. These amici curiae file this brief in the hope that it will aid the Court in fashioning a proportionate liability doctrine that will operate harmoniously in both the settlement and nonsettlement contexts.

SUMMARY OF ARGUMENT

Fairness, justice and common sense dictate that proportionate liability should exist in antitrust cases. No single defendant should have to pay—or, equally important in many cases, face the risk of having to pay—all of plaintiff's alleged damages when he was at worst only partially responsible for them. The need for proportionate liability is demonstrated by the settlement coercion in *Corrugated*. In that case, the absence of proportionate liability caused defendants to face the risk of sole liability for an estimated $5 billion in alleged damages, less only the actual dollar amount of settlements. Many defendants, unable to assume that risk, were forced to forego their right to trial and to settle without regard to culpability or possible damage caused.

This Court should adopt proportionate liability in antitrust cases, as it has in other contexts, because it is fundamentally fair. The trend of the law is clearly toward broader application of proportionate liability.

Proportionate liability may be achieved in different ways depending upon the factual circumstances of the case. Contribution is appropriate among nonsettling defendants and between defendants and non-defendant co-conspirators. However, in a multi-defendant case involving settlements, contribution against settlors should not be allowed. Rather, in the settlement context, proportionate liability should be achieved by "carving out" from the potential liability faced by nonsettling defendants the proportionate share attributable to those defendants who have settled. Carve-out

has been applied in an increasing number of cases, including large class action treble damage suits. It guarantees that no single defendant will be liable—or face the risk of liability—for an entire universe of alleged damages for which he was not, or was only partially, responsible.

In addition to being fundamentally fair, proportionate liability in antitrust cases, particularly through carve-out, is appropriate because it promotes the congressional policies of deterrence and disgorgement underlying the antitrust laws. Carve-out also accommodates the public policies favoring equitable settlements and poses no manageability problems for the trial courts.

ARGUMENT

I. *CORRUGATED* DEMONSTRATES THE UNFAIRNESS WHICH RESULTS FROM THE ABSENCE OF PROPORTIONATE LIABILITY.

In *Corrugated,* the possibility that there would be no proportionate liability effectively coerced defendants into foregoing their right to trial and settling for amounts unrelated to the merits of plaintiffs' case. The scenario in *Corrugated* conclusively demonstrates the need for proportionate liability in antitrust cases.

A. Without Proportionate Liability, *Corrugated* Defendants Were Coerced To Settle For Progressively Increased Amounts Because They Could Not Risk Sole Liability For The Enormous Alleged Damages.

Corrugated has its genesis in a federal grand jury price-fixing investigation of the corrugated container industry. In January 1978, the grand jury indicted fourteen manufacturers and twenty-six of their employees. Willamette was not indicted. Weyerhaeuser, along with certain other defendants, pleaded *nolo contendere.* The trial of the remaining defendants, including three Weyerhaeuser employees, began on January 22, 1979 and lasted fifteen weeks. After less than three hours of deliberation, the jury acquitted.

Before the grand jury returned the indictments, thirty-seven manufacturers of corrugated products, twenty-three of whom were never indicted, were named as defendants in treble damage class actions. The district court subsequently certified a class covering purchases during an eighteen-year period. Each defendant faced potential sole liability for $5 billion or more in damages, according to plaintiffs' estimate, making the case one of the largest in history.

Plaintiffs quickly settled with St. Regis Paper Company, an unindicted defendant, for $1.7 million and with International Paper Company ("IP"), a felony indictee, for $8.3 million. The settlement amounts were based on a "point" system which plaintiffs designed and used throughout much of the settlement process.[4]

In December 1978, the class plaintiffs settled with Union Camp Corporation, an unindicted defendant, for $2 million per point, twice the amount paid by IP, a felony indictee. After the announcement of the Union Camp deal, defendants stampeded to plaintiffs' offices to settle before plaintiffs further increased the price per point.

The reasons for the stampede are plain. The Union Camp settlement made it clear that plaintiffs would "up the ante" for each successive settlement. In the absence of proportionate liability, each successive settlement increased the nonsettlor's risk of sole liability for the estimated $5 billion damages (less only the actual dollar amount of the settlements). Defendants—even those who were unindicted and convinced of their innocence—found that risk unacceptable as a matter of prudent business judgment.

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[4] The term "point" refers to a defendant's percentage of the total corrugated container and sheet sales made by all defendants between 1972 and 1976. A defendant with one percent of defendants' total sales would have one point. Plaintiffs' $1.7 million settlement with St. Regis equalled approximately $500,000 per point. IP paid $1 million per point.

The inequities and arbitrariness inherent in the coercive settlement process due to the absence of proportionate liability are evident in a comparison of the IP settlement with those of Willamette and Weyerhaeuser. Willamette with 4.18 points (*i.e.*, percent of defendants' market) was not indicted by the grand jury and, even though it did not participate at trial, its innocence was confirmed by the jury.[5] In contrast, IP, with 8.3 points, was a felony indictee found by the jury in the class action trial to be a conspirator. Nevertheless, Willamette, as a late settlor, was compelled by the absence of proportionate liability to pay $11,286,000 in settlement, while IP, through a quick, early settlement, paid only $8.3 million.[6]

Weyerhaeuser, with 7.83 points, also had a smaller market share than IP, yet Weyerhaeuser paid more than four times as much as IP in total dollars—$39 million compared to IP's $8.3 million. Since Weyerhaeuser was a late settlor, plaintiffs were able to demand in the absence of proportionate liability that it pay five times the rate IP paid. The Continental Group, Inc., which was later acquitted in the criminal case and was one of the last companies to settle, was forced to pay six and one-half times the IP rate.

B. Innocent Defendants In *Corrugated* Were Forced To Forego Their Right To Trial.

While many defendants might have gone to trial and proved themselves innocent if proportionate liability had applied, the staggering risk of possible sole liability for an entire industry left defendants with no realistic choice but to

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[5] In the one civil case that was tried, the jury vindicated fourteen defendants by finding that they were not members of the alleged conspiracy. Yet those innocent defendants, because of the settlement coercion arising from the absence of proportionate liability, paid over $47 million to the class plaintiffs in settlements.

[6] It has been noted that, as a general proposition, a defendant which considers itself likely to be found guilty is most apt to seek an early, sweetheart settlement. *Manual for Complex Litigation* §1.46 at 63 (1977). An innocent defendant, reluctant to settle at all, would likely be the last to settle.

settle. Thus, before a single deposition was taken, plaintiffs garnered almost $300 million in settlements.

That plaintiffs' settlement techniques were inherently coercive is not disputed even by the trial court:

> It appears that Westvaco seeks contribution primarily to avoid the coercive impact to it, as a late-settling or non-settling defendant, of the possibility of enormous damages being assessed against it. *That this possibility is inherently coercive is undisputable . . . . Even a defendant relatively certain of a judgment in his favor must have serious doubts about risking such exposure by going to trial.*

In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40, 41 (S.D. Tex. 1979) (emphasis added). The court's evaluation of the risk proved accurate. All but one of the thirty-seven defendants thus far have been compelled to capitulate to plaintiffs' demands.

The risk—even if remote—of potentially ruinous exposure and the devastating impact of such risk on relatively small defendants is well illustrated by the plight of Green Bay Packaging Company, Inc., a family-owned corrugator not indicted by the grand jury. Green Bay, determined to prove its innocence at trial, resisted an early settlement. As more defendants settled, however, Green Bay became less able to withstand the risk of enormous and ever-growing liability. Plaintiffs offered to settle with Green Bay for $3.7 million per point, a rate approximately *seven and one-half times* higher than the settlement offered to St. Regis. Green Bay was confronted with the Hobson's choice of paying the settlement or bearing the risk, however remote, of a billion dollar or more judgment by going to trial. As George F. Kress, founder and president of Green Bay, stated:

> The effect of this extortive settlement practice upon a small, family-owned and managed business is catastrophic. We were threatened with a loss of over 50 years of effort, and coerced into paying an

> exorbitant settlement rather than being afforded the privilege of ultimately proving our corporate innocence.[7]

The company finally capitulated to plaintiffs' demands. The reality and inequity of the coercion which Green Bay suffered because of the absence of proportionate liability was made clear by the special verdict returned in the class-action trial: the jury specifically found that Green Bay did not participate in the alleged conspiracy.

One commentator observed that in *Corrugated* "defendants had little or no choice but to settle, even if they were innocent of wrongdoing, because of the potentially staggering liability" facing them.[8] Recent Developments, *Contribution Among Antitrust Defendants,* 33 Vand. L. Rev. 979, 995 (1980) (footnote omitted). Indeed, the risk of the staggering potential liability caused Westvaco, one of the defendants who stood trial, to capitulate and settle for nearly $1 million just days before the conclusion of the civil trial. Yet, at the

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[7] *Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcommittee on Antitrust, Monopoly and Business Rights of the Committee on the Judiciary,* 96th Cong., 1st Sess. 45 (1979) (statement of George F. Kress).

[8] Concern with the fair disposition of class action treble damage suits has often been expressed, quite apart from the context of proportionate liability, in light of the enormity of the potential liability involved. As this Court observed in *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 476 (1978):

> Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.

See Hooley v. *Red Carpet Corp. of America,* 1975 Trade Cas. (CCH) ¶60,285 at 66,112 (D. Ore. 1975), *appeal dismissed,* 549 F.2d 643 (9th Cir. 1977) (enormous risk of class action treble damages "may well result in some or all of the defendants opting for a settlement . . . whether they were guilty of the plaintiffs' allegations or not").

hearing on the preliminary approval of Westvaco's settlement, the trial court stated that both it and the jury would have found that Westvaco was not a member of the conspiracy.[9]

The settlement coercion and the inability of innocent defendants in *Corrugated* to exercise their right to trial conclusively demonstrate the need for proportionate liability in antitrust cases.

II. THIS COURT SHOULD ADOPT PROPORTIONATE LIABILITY IN ANTITRUST CASES, AS IT HAS IN OTHER CONTEXTS, BECAUSE IT IS FUNDAMENTALLY FAIR.

The archaic common law rule against proportionate liability, originating in the English case of *Merryweather* v. *Nixan*, 101 Eng. Rep. 1337 (K.B. 1799), has been rejected in England and by a growing number of American courts in increasingly diverse contexts.[10] This Court has consistently favored proportionate liability in the cases in which the issue has been raised. *E.g., United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 411 (1975); *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974).

Courts of appeals have apportioned liability in a variety of contexts.[11] In *Professional Beauty Supply, Inc.* v. *National*

[9] Transcript of Proceedings, September 16, 1980, at 10-12, *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.).

[10] Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution To A Recurring Problem*, 32 U. Fla. L. Rev. 217, 225 (1980).

[11] *E.g.*, sex discrimination under Title VII of the Civil Rights Act of 1964, *Glus* v. *G. C. Murphy Co.*, 629 F.2d 248 (3d Cir.), *petition for cert. filed sub nom. Retail, Wholesale & Dep't Store Union* v. *G.C. Murphy Co.*, 49 U.S.L.W. 3252 (Sept. 22, 1980)(No. 80-461); negligence, *Gomes* v. *Brodhurst*, 394 F.2d 465 (3d Cir. 1968) and *Martello* v. *Hawley*, 300 F.2d 721 (D.C. Cir. 1962); wrongful death, *Doyle* v. *United States*, 441 F. Supp. 701 (D.S.C. 1977); securities,

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Beauty Supply, Inc., 594 F.2d 1179 (8th Cir.), *en banc rehearing denied* (April 17, 1979), the Eighth Circuit, unlike the Fifth Circuit in the instant case, held that proportionate liability exists in antitrust cases. The Third Circuit recently noted the trend in favor of proportionate liability, stating that "the rule prohibiting contribution has come into disrepute." *Glus* v. *G. C. Murphy Co.*, 629 F.2d 248, 252 (3d Cir.), *petition for cert. filed sub nom. Retail, Wholesale & Dep't Store Union* v. *G. C. Murphy Co.*, 49 U.S.L.W. 3252 (Sept. 22, 1980) (No. 80-461).[12]

The rule prohibiting proportionate liability has been rejected principally because it is fundamentally unfair. It required a defendant to pay—or bear the risk of having to pay—damages he did not cause. As this Court stated in *Cooper Stevedoring:*

> A "more equal distribution of justice" can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame.

417 U.S. at 111 (citation omitted). *See Edmonds* v. *Compagnie Generale Transatlantique,* 443 U.S. 256, 271-72 n.30 (1979).

Fairness has also been the determining consideration that has led several courts of appeals to embrace a system of proportionate liability. In *Professional Beauty Supply,* the Eighth Circuit revealed that "the deciding factor in our

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Heizer Corp. v. *Ross,* 601 F.2d 330 (7th Cir. 1979); and airline disasters, *Kohr* v. *Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied,* 421 U.S. 978 (1975).

[12] Similarly, in *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U.S. 256, 271-72 n.30 (1979), this Court summarized the current state of the law by noting that "normally, the chosen tortfeasor may seek contribution from another concurrent tortfeasor."

decision [to apportion liability] is fairness between parties." 594 F.2d at 1185. It went on to say:

> There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer.

Id. at 1185-86 (citation omitted). Expressly following the rationale of *Professional Beauty Supply,* the Seventh Circuit recently permitted contribution in a Rule 10b-5 case, noting that proportionate liability results in "a 'more equal distribution of justice.' " *Heizer Corp.* v. *Ross,* 601 F.2d at 332, *quoting Cooper Stevedoring,* 417 U.S. at 111.

In an earlier case involving settlements, *Gomes* v. *Brodhurst,* 394 F.2d 465 (3d Cir. 1968), proportionate liability was achieved through carve-out. The Third Circuit observed in *Gomes*:

> There is no longer a legitimate place in our system, if, indeed, there ever was, for a rule of law which places the full burden of restitution upon one who is only in part responsible for a plaintiff's loss.[13]

Id. at 467. The fundamental unfairness of a rule prohibiting proportionate liability has led this and other courts to abandon the rule in many contexts and is, standing alone, sufficient grounds for rejecting it in antitrust cases as well.

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[13] The court affirmed that view in *Glus,* where it noted:

> It is now widely recognized that fundamental fairness demands a sharing of the liability. Without a right of contribution a wrongdoer may escape liability for his actions because of the happenstance of the plaintiff's choice of defendants.

629 F.2d at 252.

III. PROPORTIONATE LIABILITY SHOULD BE ACHIEVED THROUGH CARVE-OUT IN CASES IN WHICH SETTLEMENTS HAVE OCCURRED.

Proportionate liability may be achieved through different methods, depending upon the context of the case.[14] Contribution apportions liability equitably among nonsettling defendants, and between defendants and nondefendant co-conspirators. However, contribution should not be permitted against settling defendants. The possibility that a settling defendant will be liable to nonsettlors for his contribution share would destroy the settlor's expectations of repose and therefore would chill his motivation to settle. *Gomes* v. *Brodhurst*, 394 F.2d at 468.

In the settlement context, proportionate liability should be achieved through carve-out. Carve-out renders contribution from settlors unnecessary,[15] and therefore assures the settlor that his settlement with plaintiffs will be the full extent of his liability in the case.

Several courts have adopted the carve-out approach in settlement contexts. One of the earliest and most instructive of these cases was *Judson* v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954). In *Judson*, the court was required to determine the effect of settlements on the contribution rights of the nonsettling defendants. The court, in an opinion written by Mr. Justice Brennan while he was a member of the Supreme Court of New Jersey, concluded that the dollar

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[14] Regardless of the method employed, proportionate liability does not alter a defendant's joint and several liability. Where contribution or carve-out applies, a plaintiff remains entitled to recover his entire judgment from a single defendant, if he so chooses. The remedy of a sole defendant under such circumstances is to seek contribution from the remaining wrongdoers.

[15] When the settling defendant's share of liability is carved out from the potential liability the nonsettling defendants would otherwise face, nonsettlors remain liable only for the damages fairly allocable to them. Thus, they have no need to seek contribution from settlors.

amount of liability attributable to settling defendants must be deducted from any damages ultimately recoverable from nonsettling defendants.[16] Justice Brennan regarded removal of the settling defendant's share of damages from the potential amount recoverable from remaining defendants as both necessary and practical. He stated that this solution effectively blends the themes of compromise and contribution while maintaining the essential integrity of each.

Under *Judson*, a settlor's liability for contribution is discharged; a credit, equal to the settlor's proportionate share of damages, is applied to the total damage award. The nonsettlors' contribution rights are extinguished to the extent of the proportionate reduction in damages, making the settlement final. Thus, the policy favoring settlements is not impaired. 110 A.2d at 36-37.[17]

The Third Circuit applied carve-out in *Gomes* v. *Brodhurst*, 394 F.2d 465 (3d Cir. 1968), where, as in *Corrugated*, a nonsettling defendant sought contribution from a settling defendant. The court of appeals resolved the issue by directing the district court to carve out from the original verdict the amount that would have represented the settling

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[16] This Court need not consider at the present juncture the method by which a settling defendant's share of liability should be determined, although it may wish to do so. A number of alternatives exist, including a pro rata division of damages *(Professional Beauty Supply)* or an apportionment of damages based on comparative fault *(Gomes)*. The optimal and practical method of determination in a case such as *Corrugated* would be to carve out from the sum of any eventual damages a proportionate amount equal to the settling defendants' combined market shares. In *Corrugated*, such market share data was available to plaintiffs even before discovery began and, in fact, was used by plaintiffs as the basis for settlement negotiations.

[17] Another early case that adopted the carve-out approach in the settlement context was *Martello* v. *Hawley*, 300 F.2d 721 (D.C. Cir. 1962). That approach was reaffirmed in *Brightheart* v. *McKay*, 420 F.2d 242 (D.C. Cir. 1969).

defendant's share of liability, had it not settled. It expressly rejected the approach taken by the district court, which subtracted from the damage award only the amount of the actual settlement figure. The Third Circuit reasoned that this result was the only proper accommodation of the policies of fairness underlying contribution and those favoring voluntary settlement. *Id.* at 467-70. By carving out the settling defendant's proportionate share of liability, the court preserved the settlement while leaving the nonsettling defendant responsible only for his proportionate share of the judgment.[18]

The desire to preserve settlements and to implement *Professional Beauty Supply*'s concern for fairness among all parties in the settlement context prompted a district court in a recent price-fixing case, *Little Rock School District* v. *Borden, Inc.*, 1980-1 Trade Cas. (CCH) ¶63,059 (E.D. Ark. 1979), to adopt carve-out. The court held that any settlement between plaintiffs and any defendant "must release non-settling defendants from liability for the settling defendant's actions and also

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[18] The Fifth Circuit has held that, where proportionate liability is proper, it should be achieved in the settlement context through carve-out. Thus, in *Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), a non-collision maritime personal injury case in which plaintiff settled with two of the defendants, the court held that Leger had relinquished any claims he had against settlors and that the judgment against the third defendant would be reduced by no more or less than the amount attributable to the settlors.

Similarly, in *Doyle* v. *United States*, 441 F. Supp. 701, 713 n.5 (D.S.C. 1977), the court applied carve-out in holding that a nonsettling defendant should receive "an equitable credit" that represents a settling defendant's proportionate share of total damages, regardless of the amount actually paid by him in settlement. This result protects nonsettling defendants from the inequity of being held liable for more than their fair share of damages. It does so by removing the settlors' proportionate share of damages from the litigation, thus rendering unnecessary any post-settlement contribution claims against them by nonsettling defendants.

release the settling defendant from any liability for contribution . . . ." *Id.* at 77,252.

IV. PROPORTIONATE LIABILITY IS PARTICULARLY APPROPRIATE IN ANTITRUST CASES BECAUSE IT PROMOTES THE DETERRENCE AND DISGORGEMENT POLICIES UNDERLYING THE ANTITRUST LAWS.

An additional, independent reason for adopting proportionate liability in antitrust cases is the fact that it promotes the congressional policies underlying the antitrust treble damage action: deterrence of future antitrust violations and disgorgement of the violator's illegal gains. *Pfizer Inc.* v. *Government of India,* 434 U.S. 308, 314 (1978); *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134, 138-39 (1968).

A. Proportionate Liability Enhances Deterrence.

This Court and others have consistently recognized that proportionate liability enhances deterrence. In *United States* v. *Reliable Transfer Co.,* 421 U.S. at 405 n.11, this Court stated that a rule which fairly apportions liability "imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others." That observation is no less true with respect to enforcement of the antitrust laws. Indeed, the absence of proportionate liability undermines deterrence of antitrust violations because some guilty defendants may escape punishment altogether. In *Professional Beauty Supply,* the Eighth Circuit concluded:

> The fact that one tortfeasor may be held liable for all the damages arising from the antitrust violation necessarily means that other joint tortfeasors may go "scot free." This possibility of escaping all liability might cause many to be more willing, rather than less willing, to engage in wrongful activity. . . . To deny contribution would be to dilute the deterrent effect of the antitrust laws, since a participant in an antitrust violation could escape all responsibility for its wrongdoing.

594 F.2d at 1185. Similarly, the Seventh Circuit in *Heizer* recognized that "by apportioning the loss among joint wrongdoers the deterrent effect of the judgment is felt by all culpable parties . . . ." 601 F.2d at 332.[19]

The Fifth Circuit concluded in this case that proportionate liability will not enhance deterrence.[20] It reasoned that a businessman faced with the remote possibility of sole liability for massive damages is less likely to violate the antitrust laws than a businessman faced with near certain, but shared, liability. However, that conclusion is inconsistent not only with business realities, but also with the Fifth Circuit's own position in prior proportionate liability cases.

With respect to the impact of proportionate liability on businessmen, one commentator has recently concluded that it ultimately deters businessmen from disobeying the law. Note, *Contribution in Private Antitrust Actions,* 93 Harv. L. Rev. 1540, 1545-46 (1980). He concludes that it is often middle level managers' decisions that lead to antitrust violations. Their goals are career advancement, so they are likely to be more concerned about the impact of detection on their careers than about the magnitude of their employers' liability. Increasing the likelihood through proportionate liability that more companies will pay their fair share of damages for

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[19] In *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cas. (CCH) ¶62,995 at 79,707 (10th Cir. 1979), *en banc rehearing granted and pending* (Dec. 27, 1979), Judge Holloway, in the dissenting portion of his opinion, stated: "In view of the deterrent function of trebled damages, it is only logical that others engaged in the violations ought to bear some of the punishment and face deterrence." (citation omitted.)

[20] *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897, 901 (5th Cir.), *en banc rehearing denied,* 608 F.2d 524 (1979), *cert. granted sub. nom. Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 49 U.S.L.W. 3332 (November 4, 1980) (No. 79-1144).

antitrust violations increases the likelihood that such violators will be identified and disciplined. Consequently, proportionate liability fosters corporate vigilance and increases deterrence:

> The deterrent effect of a determination that those managers violated the antitrust laws would not be tied to the magnitude of liability because firm sanctions against such managers depend primarily upon the fact of violation. Under such circumstances, allowing contribution would best deter antitrust violations, for it would increase the probability that the company will be held liable for those violations and hence increase the frequency of company sanctions against overzealous employees.

93 Harv. L. Rev. at 1546 (footnotes omitted).

The Fifth Circuit's contrary conclusion in this case is inconsistent with one of its own recent decisions. In *Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246, 1249 (5th Cir. 1979), the court characterized as "cogent" this Court's reasoning in *Reliable Transfer* that proportionate allocation of damages imposes the strongest deterrent against wrongful conduct.

Thus, the overwhelming weight of authority—including the Fifth Circuit's own prior decision in *Leger*—supports the conclusion that proportionate liability more effectively deters violations of the law than a system which permits some wrongdoers to escape liability "scot-free."

B. Proportionate Liability Better Assures Disgorgement Of Any Illegal Gains.

Without proportionate liability, a wrongdoer not named as a defendant is immune from civil liability and is therefore permitted to retain the fruits of his illegal conduct. With proportionate liability, however, that same violator will very likely be compelled to disgorge his illegal profits. *Texas Industries* clearly illustrates how non-defendant wrongdoers escape disgorgement under the Fifth Circuit's no-contribution

rule. Although four companies were indicted and pleaded *nolo contendere* to price-fixing charges in the criminal case out of which *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.* arose, plaintiff sued only one indictee, Texas Industries. Only if Texas Industries' contribution claim against the three remaining indictees is allowed will they be required to surrender any fruits of their alleged unlawful conduct.

The *Texas Industries* situation is not uncommon. In *Cackling Acres, Inc.* v. *Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977), certain egg producers alleged that Olson Farms and four other egg distributors had fixed at artificially low levels the prices at which the distributors bought eggs from the producers. Plaintiffs, however, sued only Olson Farms; the four other alleged co-conspirators, who purchased 88% of the eggs involved, were never named as defendants.[21] The jury found that the four non-defendant distributors participated in the

[21] It was revealed at trial that plaintiffs chose not to sue the other distributors because plaintiffs wished to preserve their business relationship with them. Petition for Rehearing at 4, n.2, *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cas. (CCH) ¶62,995 (10th Cir. 1979), *en banc rehearing granted and pending* (December 27, 1979). Judge Holloway, concurring and dissenting, recognized the dangers of selective enforcement of the antitrust laws by private plaintiffs. He noted that plaintiffs have the potential of deliberately choosing to sue "a less formidable, but financially responsible defendant, and avoiding litigation with other equally culpable parties." He concluded that, "if contribution should be denied in such circumstances, the deterrent policy of the antitrust statutes will be significantly frustrated." *Id.* at 79,706-07.

The court in *Professional Beauty Supply* anticipated Judge Holloway's concerns. The Eighth Circuit concluded that the possibility of a particular violator escaping liability altogether "significantly increases where a large or powerful tortfeasor has sufficient economic influence to prevent a plaintiff from including it as a defendant." 594 F.2d at 1185.

alleged conspiracy with Olson Farms. A $2.4 million judgment, based upon the purchases of all five distributors, was entered against Olson Farms, which paid the judgment in full. Olson Farms' contribution claim against the other four egg distributors was dismissed.[22] The non-defendant co-conspirators, responsible for 88% of the damages, so far have retained every penny of their illegal gains. Only if Olson Farms is eventually allowed contribution will the co-conspirators be compelled to disgorge any illegal gains.

C. Carve-Out, In Particular, Promotes Deterrence And Disgorgement By Discouraging "Sweetheart" Settlements.

With proportionate liability achieved through carve-out in the settlement context, plaintiffs are more inclined to strive for a settlement from each defendant for an amount commensurate with that defendant's alleged liability. Quick, "sweetheart" settlements with the most culpable defendants are uneconomical to plaintiffs and therefore occur infrequently. Knowledge on the part of would-be violators that they cannot violate the law and then escape the ensuing liability through fortuitous naming of defendants, side-deals or cheap settlements provides a strong deterrence against illegal conduct. Also, the elimination of sweetheart deals better assures that those defendants most likely to be found liable will suffer commensurate disgorgement. Defendants less likely to be found liable will either achieve settlements reflecting that fact or seek vindication at trial.

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[22] *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1977-2 Trade Cas. (CCH) ¶61,698 (D. Utah 1977), *affirmed*, 1979-2 Trade Cas. (CCH) ¶62,995 (10th Cir. 1979), *en banc rehearing granted and pending* (Dec. 27, 1979). Thus, although the Tenth Circuit initially denied contribution, it has decided to reconsider the question *en banc*. Of the three judges on the original *Olson Farms* panel, the two members of the Tenth Circuit split their votes—Judge Holloway filed an opinion which agreed with *Professional Beauty Supply*. The third judge, sitting by designation, wrote the panel opinion.

V. ACHIEVING PROPORTIONATE LIABILITY THROUGH CARVE-OUT IN THE SETTLEMENT CONTEXT HAS ADDITIONAL ADVANTAGES.

A. Carve-out Is Fair To Plaintiffs.

In addition to allocating damages fairly among settling and nonsettling defendants, carve-out is fair to plaintiffs. With carve-out, plaintiffs, in exchange for the settlements they obtain, release their claims against settlors. *Rose* v. *Associated Anesthesiologists,* 501 F.2d 806 (D.C. Cir. 1974). The fairness to plaintiffs of such a procedure was recognized by Mr. Justice Brennan in *Judson:*

> The injured party . . . cannot complain of unfairness, since "the reduction would be a direct result of his own act in accepting less than the settlors' pro rata share of the total recoverable damages in settlement with the compromising wrongdoer."

110 A.2d at 37 (citations omitted). Certainly, carve-out will not render plaintiffs unable to recover fully for their injuries.[23]

B. Carve-Out Will Not Deter Settlements.

Any argument that carve-out deters settlements is demonstrably meritless. Defendants' ability and willingness to buy peace is the same under carve-out as it is under a rule of no proportionate liability. Nor does carve-out deter plaintiffs from settling. Indeed, even in *Corrugated,* prior to the verdict

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[23] Indeed, in *Leger* v. *Drilling Well Control, Inc.,* 592 F.2d 1246 (5th Cir. 1979), the plaintiff's total recovery under carve-out actually exceeded the judgment in the case. Plaintiff settled with one defendant for an amount which was subsequently determined by the jury to be greater than that defendant's actual share of liability. The Fifth Circuit reduced the judgment against the remaining defendant not by the actual settlement amount but only by the settlor's proportionate share of damages as determined by the jury. By retaining the settlement overage and also recovering the full amount of the nonsettlor's proportionate share of damages, the plaintiff recovered more than the judgment amount.

in the class-action case, Westvaco entered into a settlement under which the amount of damages attributable to its sales of corrugated products was carved out from the universe of damages recoverable. Antitrust plaintiffs in several other cases as well have specifically provided for carve-out in their settlements.[24]

As an American Bar Association Antitrust Section Report notes, the only settlements that might be chilled would be "unfair settlements based on the risk of massive liability, without regard to culpability or damage caused." [25] As this Court has previously stated: "a rule of fairness in court will produce fair out-of-court settlements." *United States* v. *Reliable Transfer Co.*, 421 U.S. at 408 (footnote omitted).

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[24] *See In re Cement and Concrete Antitrust Litigation*, M.D.L. 296 (D. Ariz.), reported at 932 Antitrust & Trade Reg. Rep. (BNA), D-2-3 (Sept. 27, 1979) and 927 Antitrust & Trade Reg. Rep. (BNA), A-1 (Aug. 16, 1979); *In re Glassine and Greaseproof Antitrust Litigation*, No. 80-891 (E.D. Pa.); *In re Fine Paper Antitrust Litigation*, M.D.L. 323 (E.D. Pa.); *In re Folding Carton Antitrust Litigation*, M.D.L. 250 (N.D. Ill.); *In re Plywood Antitrust Litigation*, M.D.L. 159 (E.D. La.).

[25] American Bar Association, Section of Antitrust Law, *Resolutions and Report of the Section of Antitrust Law of the American Bar Association on Proposed Amendment of the Clayton Act to Permit Contribution in Damage Actions Brought Thereunder* 8 (September 6, 1979), reprinted in 936 Antitrust & Trade Reg. Rep. (BNA) E-2 (October 25, 1979) ("ABA Report"). The Senate Judiciary Committee has also expressly rejected the notion that proportionate liability "will undermine the settlement process." It found that the only settlements proportionate liability "will discourage in the long run are those it is intended to discourage—namely coerced settlements." S. Rep. No. 428, 96th Cong., 1st Sess. 19 (1979).

C. Carve-Out Will Not Complicate Antitrust Cases Or Pose Manageability Problems For Trial Courts.

Opponents of contribution sometimes argue that it would unduly complicate antitrust cases and make them unmanageable.[26] However, no one suggests that, where settlements are involved, carve-out poses such problems. Indeed, carve-out actually simplifies cases because plaintiff does not have to prove at trial the damages attributable to settlors. Furthermore, no additional complaints, cross-claims or other pleadings need to be filed, and the court will not be confronted with severance motions under Federal Rule of Civil Procedure 42(b).

Even if the situation were otherwise, the obvious unfairness of a rule against proportionate liability cannot be justified "simply because it may reduce court costs and make litigation simpler."[27] As this Court stated in *Reliable Transfer:*

> For, at bottom, [this argument] asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations.

421 U.S. at 408.

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[26] Significantly, *Professional Beauty Supply* rejected arguments that contribution, which is not as easy to administer as carve-out, would present manageability problems. 594 F.2d at 1185.

[27] ABA Report at 6.

CONCLUSION

For the foregoing reasons, Weyerhaeuser Company and Willamette Industries, Inc. submit that proportionate liability should exist in antitrust cases and that carve-out should be used to achieve proportionate liability in cases in which one or more defendants have settled. Carve-out is fair to all parties, promotes the congressional policies of deterrence and disgorgement and the policies favoring settlements without complicating the litigation.

Respectfully submitted,

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Dated: December 18, 1980